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# "LAW AND FACT" IN JURY TRIALS.

THE discrimination of law and fact, in its relation to jury trials, is often identified by practitioners, judges, and law-writers, with the question of what matter is for the court and what for the jury. This contains an important intimation, namely, that the notion of "law and fact," when thus spoken of, is limited to the issue; for juries have nothing to do with anything but the issue; of this more will be said later on. But if we ask the question what sort of thing it is that is for the court and what for the jury, we do not get on, for we are told that matters of law are for the court, and matters of fact for the jury, — ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores. We do not, then, escape the necessity of trying to determine what is matter of fact and what matter of law.

I. In endeavoring to help answer that question let us ask what it is that juries, inquests, assizes, were created for. We shall find the answer in the old precept to the viscount for summoning them, and in their oath. The viscount was to summon those "who best can and will" *veritatem dicere.* The jurors in the assize of novel disseisin swore, one after another, as Bracton gives it in his Latin: [1] "Hoc auditis, justitiarii, quod *veritatem dicam.* . . . de tenemento de quo visum feci;" and their verdict was this promised *veritatis dictum.* They were wanted, in a pending legal controversy, where

[1] Fol. 185.

the parties were at issue on some question of fact, to say what the fact was, and the name for this thing was "rei veritas." The truth of the thing about what? About all sorts of questions. Was a party in possession of something? Did he disseise somebody? Had he put his seal to a paper? Did he enfeoff another of land? and what land? What is the *consuetudo*, the custom, of such a place? Is a person legitimate, or a *nativus*, or an idiot, or insane? This is the same sort of question that juries pass on to-day, — having the same elements of opinion and law, compounded with the simpler features which catch the eye and ear; questions of fact, as we say.

Now, although juries had only to do with an issue, yet questions of fact were by no means limited to the issue. The courts settled a great many questions of fact for themselves; they could not take a step without passing upon such questions. Was the deed that was put forward in pleading "rased" or not? If a party claimed the right to defend himself as a maimed person, was it really mayhem? Was a person presenting himself and claiming to be a minor, really under age? A stream of questions as to the reality, the rei veritas, the fact, of what was alleged before them, was constantly pouring in. A prisoner, for example, had confessed; on being brought into court, he declared that it was by duress of his jailer. Was this so? To find this out the justice took the short cut of sending for several of the fellow-prisoners and the jailer, and questioning them all in the prisoner's presence; and he found that it was not true.[1] This, again, is just as it is to-day. Courts pass upon a vast number of questions of fact that do not get into the pleadings. Courts existed before juries; juries came in to perform only their own one special office, and the courts have continued to retain a multitude of functions which they exercised before, in ascertaining whether disputed things be true. In other words, there is not and never was any such thing as an allotting of all questions of fact to the jury. The jury simply decide some questions of fact. The maxim ad quæstionem juris respondent judices, ad quæstionem facti respondent juratores, was never true, if taken absolutely.[2] It was a favorite with Coke in discussing special

[1] Y. B. 30 and 31 Edw. I. 543 (*circa* A.D. 1300). "Ecce," says the justice, "socii vestri in prisona testificantur coram vobis. . . . Vis tu aliud aliquid dicere?"

[2] This "decantatum," as Vaughan called it, in his famous opinion in Bushell's Case

verdicts, and in Isaack *v.* Clark[1] he attributes it to Bracton; but that appears to be an error; at any rate, a careful search for it in Bracton has failed to discover it. It seems likely that Biener is right when he intimates that this formula took shape in England in the sixteenth century.[2] But the maxim was never meant to be taken absolutely. It is, as I said, limited to questions with which the jury has to do; it relates to *issues* of fact, and not to the incidental questions that spring up before the parties are at issue, and before the trial; and so of many of those which present themselves during the trial. Apart from "evidence," to which the maxim has no reference, the jury has to do with only a limited class of questions of fact, namely, questions of ultimate fact; it is only to these that the maxim applies.[3]

If, then, we limit the inquiry to the issue, in what sense is it true? (1.) As stating the great, general rule that the regular common-law mode of trying questions of fact is by jury; *e.g.*, it is accurately said by Coke:[4] "The most usual trial of matters of fact is by twelve such men; for ad quæstionem facti non respondent judices; and matters in law the judges ought to decide and discuss; for ad quæstionem juris non respondent juratores." (2.) In a sense that emphasizes the limitations of the jury,— as saying that it is *only* fact which they are to decide, "Non est juratoribus judicare," was the judgment of the court in 1554, when an inquest

(Vaughan, 135), appears in a variety of forms; a common one is that in the text. Bulstrode (ii. 204 and 305) makes Coke say *jurisperitus* (and so Rolle, i. 132) and *jurisprudentes*, instead of judices.

[1] 1 Rolle, p. 132; s. c. 2 Bulst. p. 314 (1613–14).

[2] Biener, Eng.Geschw. i. ch. 2, sect. 25; ch. 5, sect. 40. For this reference I am indebted to my friend, Mr. Fletcher Ladd. Best (Ev. sect. 82, note) seems to be in error when he understands Bonnier (Preuves, 4th ed., i. sect. 119) to say that the maxim "has been long known on the Continent." Bonnier, in discussing the question whether the judge is bound by the answers of experts, does indeed refer to "le vieil adage mal à propos reponduit per certains auters modernes, ad quæstionem facti respondent juratores, ad quæstionem juris respondent judices;" but this writer was familiar with the phrases of our legal literature, and the absence of any reference to the maxim in other continental authors to which I have had any reference or access, leads me to think that Bonnier was merely quoting *le vieil adage* from our law. Coke seems to have spawned Latin maxims freely. Is this also his? and so his reference to Bracton merely to an authority for *the doctrine*, and not the phrase? In those days of polyglot law it was easy for a man to slip back and forth between his English and his Latin and law French. "*Come Bracton est*," is the expression that Rolle puts into his mouth. Bulstrode merely has it, "As Bracton."

[3] Bartlett *v.* Smith, 11 M. & W. 483; Bennison *v.* Jewison, 12 Jurist, 485; s. c. 1 Ames, Bills and Notes, 512.

[4] Co. Lit. 155 *b*.

of office had found a conclusion of law;[1] or as the counsel expressed it in another report of the case:[2] "For the office of twelve men is . . . not to adjudge what the law is, for that is the office of the court, and not of the jury." (3.) In a sense which emphasizes the right of the jury to find a special verdict in any case, and to take the opinion of the judges on the law as arising out of the facts thus returned. "It was resolved by Sir Ed. Anderson, chief-justice, and all the justices of the bench, that the special verdict . . . was well founded; they held, that in all pleas . . . and upon all issues joined . . . the jury may find the special matter . . . [and] pray the opinion of the court . . . by the common law, which has ordained that matters in fact shall be tried by jurors, and matters in law by the judges; and as ad quæstionem," etc.[3]

It is true that Coke had also a balanced way of quoting the maxim, as if it represented a limitation upon the judges as wide and general as that upon the jury. But although it became thus a loose flourish and ornament in his pedantic speech, yet its true significance may be drawn out thus: In general, issues of fact, and only issues of fact, are to be tried by jury; when they are so tried, the jury and not the court are to find the facts, and the court and not the jury is to give the rule of law; the jury are not to refer the evidence to the judge and ask his judgment upon that, but are to find the facts which the evidence tends to establish, and may only ask the court for their judgment upon these. That this determination by the jury involves a process of reasoning, of inference and judgment, makes no difference; for it is the office of jurors "to *adjudge upon their evidence* concerning matter of fact, and thereupon to give their verdict, and not to leave matter of evidence to the court to adjudge which does not belong to them."[4]

II. Let us now try to find some definition of "fact," and a just discrimination between fact and law. To define fact is, indeed, a "*perylous chose*," as they say in the Year Books; and some per-

[1] Dyer (ed. 1601), 106 *b*; and see Hill *v.* Hanks, 2 Bulst. p. 204 (1614); Isaack *v.* Clark, ib. p. 314 (1614–15); King *v.* Poole, Cas. t. Hardwicke, p. 28 (1734).

[2] Plowden, p. 114.

[3] Dowman's Case, 9 Co. pp. 12–13 (1586).

[4] Littleton's Case (1612), cited in 10 Co. p. 56 *b*.

sons think it unnecessary.[1] It is certainly true that the term is widely used in the courts, much as it is used in popular speech; that is to say, in a tentative, literary, inexact way; and there are those who would let all such words alone and not bother about precision. But as our law develops it becomes more and more important to give definiteness to its phraseology; discriminations multiply, new situations and complications of fact arise, and the old outfit of ideas and phrases has to be carefully revised. Law is not so unlike all other subjects of human contemplation and research that clearness of thought will not help us powerfully in grasping it. If terms in common legal use are used exactly, it is well to know it; if they are used inexactly, it is well to know just how they are used.

1. "Fact" and its other forms, *factum*, *fait*, stand in our law books for various things, *e.g.*, (*a*) for *an act;* just as the word fact does in our older general literature. "Surely," says Sir Thomas Browne,[2] "that religion which excuseth the fact of Noah, in the aged surprisal of six hundred years," etc.; and so Bracton:[3] "Since he is not the agent of the one who made him essoiner, it is not for him to prove another's status or another's act" (factum). (*b*) For that completed and operative transaction which is brought about by sealing and executing a certain sort of writing; and so for the instrument itself, the *deed* (factum). (*c*) As designating what exists, in contrast with what should rightfully exist, — *de facto* as contrasted with *de jure*. (*d*) And so, generally, as indicating things, events, actions, conditions, as happening, existing, really taking place. This last is the notion that concerns us now. It is what Locke expresses[4] when he speaks of "some particular existence, or, as it is usually termed, matter of fact." The

[1] For instance, a very able writer in the Solicitors' Journal (vol. 20, 869). "A definition," he remarks, "is the most difficult of all things. There is far greater probability of a correct use of terms than of a correct definition of them. The best definition, therefore, is that by use. A correct use renders definition unnecessary, because the law will speak plainly without it. And where it is unnecessary to define it is also dangerous, because an incorrect definition will confound the correct use," etc. That is a true utterance of the inherited instinct of English-speaking lawyers and judges. But it is quite certain that as our law grows it must be subjected more and more to the scrutiny of the legal scholar, and that it will profit by any serious and competent effort to clarify and restate it.

[2] Pseudodoxia Epidemica, Book v. ch. xxiii. sect. 16; on the Vulgar Error that "it is good to be drunk once a month."

[3] Fol. 337.

[4] Human Understanding, Bk. iv. chap. 16, sect. 5.

fundamental conception is that of a thing as existing, or being true. It is not limited to what is tangible, or visible, or in any way the object of sense; things invisible, mere thoughts, intentions, fancies of the mind, propositions, when conceived of as existing or being true, are conceived of as facts. The question of whether a thing be a fact or not, is the question of whether it is, whether it exists, whether it be true. All inquiries into the truth, the reality, the actuality of things are inquiries into the fact about them. Nothing is a question of fact which is not a question of the existence, reality, truth of something, of the *rei veritas*.[1] But this, it may be said, is a portentous sort of definition; it is turning every question into a question of fact. That is true, so far as any question asks about the existence, the reality, the truth of something. But of course in actual use the term has other limitations. In the sense now under discussion, as we have noticed, "fact" is confined to that sort of fact, ultimate fact, which is the subject of the issue. Moreover, that kind of fact which we call "law" is discriminated, and set apart under its own name.

[1] Bentham, who is not very instructive here, defines thus: "By a fact is meant the existence of a portion of matter, inanimate or animate, either in a state of motion or in a state of rest." But he divides facts into (1) physical and psychological; (2) events and states of things; (3) positive and negative; adding that "the only really existing facts are positive facts. A negative fact is the non-existence of a positive one, and nothing more." (Works, vi. 217–218.) And so Best, Ev. §§ 12, 13. Holland (Jurisprudence, 3d ed. 88) simply says: "'Facts' (Thatsachen, Faits), which have been inadequately defined as 'transient causes of sensation,' are either 'Events' or 'Acts.'" Sir Wm. Markby (Law Mag. and Review, 4th Series, ii. at p. 312), in a neat and valuable discussion of "Law and Fact," after remarking that he would rather not pledge himself to any final definition of what a fact is, adopts for his immediate purpose Stephen's definition in the first two editions of his Digest of Evidence, art. 1, viz.: "'Fact' means (1) everything capable of being perceived by the senses, (2) every mental condition of which any person is conscious." But Stephen afterwards withdrew this definition. He had been keenly criticised by a writer in the Solicitors' Journal (vol. 20, 869, 870; Sept. 9, 1876), who said, "The proper subject of affirmation and negation is not 'facts,' but propositions;" and, among other valuable remarks, inquired how it was with such matters as negligence, custom, ownership, the defamatory quality of a writing, and the qualities of persons and things generally. "The phraseology," he added, "is really applicable only to the rudest form of jurisprudence." The writer thought that no definition is necessary. These criticisms took effect; in his third edition (and so ever since) Stephen dropped any attempt at definition, and substituted in art. 1, this: "'Fact' includes the fact that any mental condition of which any person is conscious exists;" and in his preface to the third edition, after remarking that he "had been led to modify the definition of fact by an acute remark made on this subject in the Solicitors' Journal," he added that "The real object of the definition was to show that I used the word 'fact' so as to include states of mind." See the learned consideration whether a thing be *quid facti* or *quid juris*, in Menochius, De Præsumptionibus, Lib. 1, qu. 11.

2. What, then, do we mean by *law?* We mean, at all events, a rule or standard which it is the duty of a judicial tribunal to apply and enforce. It is not my present purpose to say anything as to the exact nature or origin of law.[1] How the rule or standard comes into existence, where it is found, just what the nature of it is, how far it is the command of a supreme political power, and how far the silently-followed habit of the community, and other like questions, — there is no occasion to consider now. It is enough to mark one characteristic of it, and to say, that in the sense now under consideration, nothing is law that is not a rule or standard which it is the duty of judicial tribunals to apply and enforce. I do not even care to say that all general standards that courts apply are to be called law; that matter I pass by.[2] But this is true, and it is enough for our present purpose, that, unless there be a question as to a rule or standard which it is the duty of a judicial tribunal to apply, there is no question of law. The inquiry whether there be any such rule or standard, the determination of the exact meaning and scope of it, the definition of its terms, and the settlement of incidental questions, such as the conformity of it, in the mode of its enactment, with the requirements of a written constitution, are all naturally and justly to be classed together; and these are questions of law.

III. But we must discriminate further. Besides questions of fact and law, there are questions of method, of procedure. "It is the office of jurors to adjudge upon their evidence," so the court is reported to have said in Littleton's Case.[3] That remark brings out a fundamental point; viz., that it is no test of a question of fact that it should be ascertainable without reasoning and the use of the "adjudging" faculty; much must be conceived of as fact which is invisible to the senses, and ascertainable only this way. Of course this function of reasoning was constantly exer-

[1] See Mr. James C. Carter's recent address before the American Bar Association, entitled "The Ideal and the Actual in Law;" and compare Holmes, Common Law, 35–38, 150–1; Markby, Elements of Law, ch. 1, sects. 1–31. Holland, Elements of Jurisprudence, c. ii. and c. iii. "A law," says Holland (3d ed., p. 36), "in the proper sense of the term, is therefore a general rule of human action, taking cognizance only of external acts, enforced by a determinate authority, which authority is human, and, among human authorities, is that which is paramount in a political society." Compare, also, Maine's Ancient Law, cc. 1 and 2; Lord Esher, M.R., in Cochrane *v.* Moore, 25 Q. B. D. 57.

[2] Markby, *ubi supra; infra*, p. 167. If a jury cannot, in point of reason, find a verdict, they cannot as a matter of law; and such questions go up on exceptions, Denny *v.* Williams, 5 Allen, 1.

[3] *Ante*, p. 150.

cised by the judges; the remark just quoted makes it apparent that it must also be exercised by juries. This sort of "evidence of things unseen" is common to both. We are not, then, to suppose that a jury has found all the facts merely because they have found all that is needed as a basis for the operation of the reasoning faculty; for as regards reasoning the judges have no exclusive office; the jury also must reason at every step.

There comes up for consideration, then, this matter of reasoning: a thing which intervenes, in questions of negligence and the like, between the primary facts, or what may be called the raw material of the case, and the secondary or ultimate facts.[1] Just as both court and jury must take notice, without proof, of much that is assumed as known to all concerned in judicial inquiries, so each must conduct processes of reasoning in accomplishing the ends of its own department. It is true that the jury was not brought into existence because the court needed help in this business, but simply to report upon the *rei veritas;* reasoning, however, was unavoidable. Courts might always have done that for themselves if they could have been furnished with a full supply of fact; but that was impracticable, and at no period of their history could juries discharge their own special function of ascertaining and reporting facts, without going through a process of reasoning. "While the juror's oath," says Bracton,[2] "has in it three *comrades* (comites), truth, justice, and judgment; truth is to be found in the juror, *justitia et judicium* in the judge; but sometimes it seems that judgment belongs to jurors, since they are to say on their oath, yet according to their belief, whether so and so disseised so and so or not." And again, [3] "If the jurors state the fact as it is (factum narraverint sicut veritas se habuerit), and afterwards judge the fact according to their statement of it and err, they make a mistaken judgment rather than a false one, since they believe that such a judgment follows such a fact." Bracton uses the expression "they judge the fact." We can observe the real nature of this operation by looking at the case of

[1] It would be straining our word "procedure" beyond due limits to say that reasoning is part of the procedure, for reasoning is essential everywhere in the law; yet one may get a useful hint by regarding it, for a moment, in that aspect. As the procedure and method of trial are to be discriminated from both law and fact, the subject-matter that is to be dealt with in these ways and methods, — so we may separate from law and fact the process by which conclusions are reached; viz., the process of reasoning.

[2] Fol. 186, *b.*

[3] Fol. 290, *b.*

expert witnesses to fact. What is their function? It is just this, of judging facts. They are called in because they are men of skill and can interpret phenomena which other men cannot, or cannot safely interpret. They judge the phenomena, the appearances, or facts which are presented to them, and testify to that which in truth these signify or really are; or they estimate qualities and values. We say that they testify to opinion. In truth, they are judging something, and testifying to their judgment of fact. It is perfectly well settled in our law that such opinions or judgments are merely those of a witness, they are to aid the jury or the judge of fact, and not to bind them; the final judgment is for the jury,[1] and, unquestionably, the judgment is one of fact. This is clearly expressed in Germany, where the expert appears to have the final authority which we allow only to the jury: "Experts judge only as to the relation of phenomena perceived by the senses to general rules of their art or science, but not at all as to the relation of a fact to legal truths (Rechtswahrheiten); that is merely the judge's affair. . . . In contrast with his judgment, what the expert decides is simply a fact, no more nor less than a mere witness's declaration, and this fact, like every other, the judge has to refer to the appropriate rule of law. For this reason experts are called *judices facti*, — *judices* as opposed to ordinary witnesses, *judices facti*, because they do not judge as to the law, but their judgment or opinion only gives as its result a fact."[2] The nature of the operation and the true character of the result are evidently just the same, whether it be the judgment of the witness or of the jury that is final. It is in either case a judgment of fact.

We have thus noticed a *tertium quid*, the process of reasoning, which we have set aside as relating to method. A further thing was brought to notice in the passage from Littleton's Case,[3] viz., "matter of evidence." The jury, it was there said, "are not [by a special verdict] to leave matter of evidence to the court to adjudge;" they are themselves "to adjudge upon that evidence concerning matter of fact."

[1] Head *v.* Hargrave, 105 U. S. 45; 3 Harv. Law Rev. 301–2; and so in modern times in France; Bonnier, Preuves, 4th ed. sect. 119.

[2] Dr. W. H. Puchta in Zeitschrift für Civilrecht und Prozess, iii. 57. Compare Das Archiv. für die Civilistische Praxis, xxvi. 255–6. For these references I am indebted to my friend, Mr. Fletcher Ladd. See also Bonnier, Preuves, *ubi supra*.

[3] *Ante*, p. 150.

Now, "matter of evidence" is here discriminated from "matter of fact." It is not, of course, to be classed with "matter of law," and it is not matter of fact in the sense which we now fix upon that phrase. What then is it? It is something incidental, subsidiary, belonging where the matter of reasoning belongs, being, indeed, only so much material offered as the basis for inference to "matter of fact." When it is said that fact is for the jury, the fact intended, as we have seen, is that which is in issue, the ultimate fact, that to which the law annexes consequences, that thing which, in a special verdict, the jury must plainly find, and not leave to the court to find. Issues are not taken upon evidential matter. Of evidence, the same thing is to be said which we have already said of the reasoning that is founded upon it; namely, that it is for both court and jury, according as either has occasion to resort to it.

I have spoken of evidence and reasoning as belonging to the region which has to do with methods of arriving at the law and fact that are involved in an issue. In expressing this I have said, with what may seem a certain violence of phrase, that they belonged, in a way, with procedure. It will be useful to indicate here, a little more plainly, just what is meant by this. Reasoning, the rational method of settling disputed questions, is the modern substitute for certain formal and mechanical "trials" (*i.e.* tests) which flourished among our ancestors for centuries, and in the midst of which the trial by jury emerged. When two men to-day settle which is the "best man" by a prize-fight, we get an accurate notion of the old Germanic "trial." Who is it that "tries" the question? The men themselves. There are referees and rules of the game, but no determination of the dispute on grounds of reason, — by the rational method. So it was with "trial by battle" in our old law; the issue of right, in a writ of right, including all elements of law and fact, was "tried" by this physical struggle, and the judges of the Common Pleas sat, like the referee at a prize-fight, simply to administer the procedure, the rules of the game. So of the King's Bench in criminal appeals; and so sat Richard II. at the "trial" of the appeal of treason between Bolingbroke and Norfolk, as Shakespeare represents it in the play. So of the various ordeals; the accused party "tried" his own case by undergoing the given requirement as to hot iron, or water, or the crumb. So of the oath; the question,

both law and fact, was "tried" merely by the oath, with or without fellow-swearers. The old "trial by witnesses" was a testing of the question in like manner by their mere oath. So a record was said to "try" itself. And so when out of the midst of these methods first came the trial by jury, it was the jury's oath, or rather their verdict, that "tried" the case. How this mode of trial came to swallow up the others, and then to lose some of its chief features, and become shaped into an instrument of our modern purely rational procedure, is a long story, and is not for this place. But as we use the phrase "trial" and "trial by jury" now, we mean a rational ascertainment of facts, and a rational ascertainment and application of rules. What was formerly "tried" by the method of force or the mechanical conformity to form, is now "tried" by the method of reason.

The long survival in our system of certain ancient forms and phrases, presently to be mentioned, makes it interesting to notice that in the older days the word "law" (lex) often indicated, not the substantive law, but a mode of trial. This comes out clearly in an exposition of the phrases *lex et consuetudo* in the old custumal of Normandy,[1] where we read: "*Consuetudines* are customs practised from ancient times, allowed by rulers and kept up by the people, determining whose anything is or to what it belongs. But *Leges* are what is instituted by rulers and kept up by the people in the country, for settling particular controversies. *Leges* are, so to speak, the rightful instrumentality for declaring the truth of a controversy. And there are certain modes of practising the *leges* (*usus*). To illustrate: the *consuetudo* is, that a widow has the third part of the fief that her husband possessed at the time of the marriage. But if a controversy arises as to whether he did then

[1] L'Ancienne Coutume de Normandie (compiled A.D. 1270–1275) c. xi. *De Consuetudine:* "Consuetudines vero sunt mores ab antiquitate habiti, a principibus approbati, et a populo conservati, quid cujus sit vel ad quod pertinet limitantes. Leges autem sunt institutiones a principibus factæ et a populo in provincia conservatæ, per quas contentiones singulæ deciduntur. Sunt enim leges quasi instrumenta in jure ad contentionum declarationem veritatis. Usus autem circa leges attendunt; sunt enim usus modi quibus legibus uti debemus. Verbi gratia: consuetudo est quod relicta habeat tertiam partem, feodi quod vir suns tempore contractus matrimonii possidebat. Si autem contentio oriatur de aliquo feodo quod tunc ille non possidebat, ipsa tamen in eodem dotem reclamante, per legem inquisitionis et hujusmodi contentio habet terminari. Usus autem sunt modi quibus hujusmodi lex habet fieri; Videlicet, per duodecim juratos et non suspectos, et feodo prius viso." Cited in Brunner, Schwur. 177. See, also, Stephen, Pleading, note 36.

possess a certain fief, in which she claims dower, it is to be settled *per legem inquisitionis*, and the like. And the methods (*usus*) are the ways in which such a *lex* is to be performed, namely, by twelve persons, under oath, worthy of credit, who have inspected the fief."

Readers of Sir Henry Maine will recall the emphasis which he puts upon the prominence of procedure in early systems of law. The Salic law, he tells us, "deals with thefts and assaults, with cattle, with swine, and with bees, and, above all, with the solemn and intricate procedure which every man must follow who would punish a wrong or enforce a right." And again: "So great is the ascendency of the Law of Actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms." [1] Our inherited law has kept in existence until a period within living memory a phrase which comes straight down from those early days. Until the year 1833 [2] certain cases in England could be tried *per legem;* a man waged his law (vadiare legem), *i.e.* gave pledges for performing it; and afterwards performed his law (facere legem). In the system from which ours came, there were formerly many of these *leges*, or means of trial. Trial by battle was the lex ultrata; by the ordeal, the lex apparens, manifesta, or paribilis; by the single oath, the lex simplex; by the oath with compurgators, the lex probabilis, or the lex disraisinæ; by record, the lex recordationis; by inquest, or the assize, lex inquisitionis and recognitionis.[3] Our phrase "law of the land" comes down out of the midst of all this; in the Germanic law it was one of the ways of defending one's self, *per legem terræ;* "by *lex terræ* is meant," says Brunner,[4] "the procedure of the old popular law." This old use of the term "law," so different from ours, is to be explained by the considerations mentioned in the last ten pages of Sir Henry Maine's "Early Law," from which I have already quoted. All the primitive codes, he says, "seem to begin with judicature, and to distribute substantive law into 'heads of dispute.'" "The authority of the Court of Justice overshadowed all other ideas and considerations in the minds of those early code-

[1] Early Law and Custom, 168, 389.

[2] Stat. 3 and 4 Wm. IV § 42, s. 13.

[3] On this subject, see Brunner, Schwur. pp. 168 *et seq.*; Spelman, Gloss. *sub voc.* Lex; Ducange, ib.

[4] Schwur. 254.

makers." "It must have been a man of legal genius who first discerned that law might be thought of and set forth apart from the Courts of Justice which administered it, on the one hand, and apart from the classes of persons to whom they administered it, on the other."

Turning back, now, from these old conceptions to our own, we are to observe again that while, of course, there are rules and laws of procedure, and while, of course, these are to be ascertained by the judges, they are not what is meant (still less is meant a mode of trial), when we contrast the law and fact that are blended in the issue. There the conception is purely that of the substantive law which is applicable to the "facts," viz., the ultimate facts that are in question. And we are to remark again that equally the topics of evidence and of reasoning, which deal with the methods of our modern "trials," belong one side of our subject.

IV. We have made our definitions and principal discriminations.[1] But, as I said at the outset, the allotment of fact to the jury, even in the strict sense of fact, is not exact. The judges have always answered a multitude of questions of ultimate fact involved in the issue. It is true that this has often been disguised by calling them questions of law. In the elaborate and carefully prepared codification of the criminal law, which has been pending for the last eleven years in the British Parliament, we are told, of "attempts to commit offences," that "the question whether an act done or omitted with intent to commit an offence is or is not only preparation . . . and too remote to constitute an attempt . . . is a question of law."[2] In a valuable letter of Chief-Justice Cockburn, addressed to the Attorney-General, and commenting on the Draft Code (dated June 12, 1879, and printed by order of the House of Commons), he very justly remarks upon this passage: "To this I must strenuously object. The question is essentially one of fact, and ought not, because it may be one which it may be better to leave to the judge to decide than to submit it to a jury, to be, by a fiction, converted into a question of law. . . . The right mode of dealing with a question of fact which it is thought desirable to withdraw from the jury is to say that it shall, though a question of fact, be determined by the judge." The

[1] As regards what are called mixed questions of law and fact, see *infra*, p. 169.

[2] Report of Criminal Code Bill Commission, Draft Code, sect. 74.

same sort of thing which is thus objected to is very common in judicial language here.

Among these questions of fact decided by judges, the construction of writing is a conspicuous illustration. The reasons for leaving questions as to the meaning and construction of writing to the judges appear to be historical and administrative; they do not rest on the ground that these are questions of law, for, mainly, they are not.[1] They are not, as a class, decided by the application of legal rules, but by a critical reading of the document in the light of the circumstances attending the making of it. Some legal rules there are, for the interpretation of writings, but in a great degree this is a question of the intention of the writer, and so a question of fact.[2] Of course, any general statement about writings must be subject to qualification, for there is a great diversity of them. There are " records," judicial, legislative, executive, such as statutes, judgments, pleadings, — the proving, use, and application of which were the subject of legal rules before juries were born; these rules largely hold their place today for reasons of sense and convenience. In a great degree these matters are for the judges. There are written memorials of law, of which some at least, those of the domestic forum, belong to the judges. There are deeds, charters, and wills, operative instruments, which are the subjects of specific legal rules as to their constitution, form, and phraseology. There is negotiable paper, of which the like is true. There are contracts in writing or written memoranda required by law. There are writings not required by law, but made by the parties merely to be a memorial of a transaction. And there are other writings of a merely casual nature, like ordinary correspondence. Many writings used to be regarded as in themselves constituting, or rather furnishing, by the mere inspection of them, a mode of " trial," of what they reported, — as records did. If such a writing were once authenticated, it closed inquiry. Such writings, even records and statutes, might be merely evidential, as when a deed in a question of prescription went to the jury merely as evidence of ancient possession, and not to show when it began.[3] But, whatever their character and how-

[1] But we all know the usual form of speech about it: " A pure question of law," say the court in Hamilton *v.* Liv. Co., 136 U. S. p. 255.

[2] See Professor Markby's interesting article on " Law and Fact," Law Mag. and Rev. (4th series) ii 313; Edes *v.* Boardman, 58 N. H. p. 592.

[3] Y. B. 34 H. VI fol. 36, pl. 7 (1456).

ever used, the construction of writings, when once the facts necessary for fixing it were known, was a matter for the courts. This has always been so; perhaps a reason for it may be that as writings came into general use and so got into our courts, mainly through the Roman ecclesiastics,[1] so the Roman methods of dealing with them were naturally adopted; and, once adopted, were not changed when new modes of trial, such as the trial by jury, came in. And, to be sure, the jury could not read. It may be added that an established judicial usage like this has always been powerfully supported by considerations of good sense and expediency. Of a great part of the writings brought under judicial consideration, it is true that they were made, as Bracton says, to eke out the shortness of human life, "ad perpetuam memoriam, propter brevem hominum vitam." Such things, so important, so long enduring, should have a fixed meaning; should not be subject to varying interpretations; should be interpreted by whatever tribunal is most permanent, best instructed, most likely to adhere to precedents.

It is on this ground of policy, or on like legislative considerations, and above all, for fear the jury should decide some question of law that was complicated with the fact, — that many other questions of fact have at one time or another been taken possession of by the judges. Whether there is malice in cases of murder, what is sufficient "cooling-time," in case of provocation,[2] and, in actions for malicious prosecution, whether the cause for instituting the prosecution were "reasonable and probable," are well-known illustrations of this. It was from like motives that courts refused to allow juries to find a general verdict in cases of criminal libel.[3]

How is it that the judges, sometimes with and sometimes without the coöperation of the parties, have worked all this out? In various ways: 1. Through their power of fixing the definition of legal terms. Such phrases as "malice," "false pretences," "fraud," "insanity," "reasonable notice," and the like, have required definition. The judges alone could give it; and they have sometimes given it as in the case of insanity, in a manner to close questions of fact which might well have been left open.[4]

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[1] Anglo-Saxon Law, 230.

[2] R. *v.* Onbey, 2 Lord Raymond, p. 1494.

[3] Com. *v.* Anthes, 5 Gray, 212–219.

[4] See the acute observations of Mr. Justice Doe in dissenting opinions in State *v.*

Of these judicial definitions our books are full. Sometimes they begin by fixing an outside limit of what is rationally permissible, as in many of the cases about reasonable time and the like; and then grow more precise. In this way what is reasonable notice of the dishonor of a bill grew to be fixed. Juries were resisted by the court when they sought to require notice within an hour, and, on the other hand, to support it if given within fourteen days, or within three days, when "all the parties were within twenty minutes' walk of each other;"[1] and so the modern rule became established that ordinarily notice is sufficient if given on the following day. In the case of uncertain fines in copyholds, the courts had previously gone through a like process of regulating excess, until at last, not without the aid of courts of equity, they had fixed a specific outside limit.[2]

2. Very soon, as it seems, after the general practice began of allowing witnesses to testify to the jury, an interesting contrivance for eliminating the jury came into existence, the demurrer upon evidence. Such demurrers, like others, were demurrers in law; but they had the effect to withdraw from the jury all consideration of the facts, and, in their pure form, to submit to the court two questions, of which only the second was, in strictness, a question of law: (1) Whether a verdict for the party who gave the evidence *could* be given, as a matter of legitimate inference and interpretation from the evidence; (2) As a matter of law. Of this expedient, I do not observe any mention earlier than the year 1456, and it is interesting to notice that we do not trace the full use of witnesses to the jury much earlier than this. Near the end of the last century demurrers upon evidence were rendered useless in England, by the decision in the case of Gibson *v.* Hunter (carrying down with it another great case, that of Lickbarrow *v.* Mason, which, like the former, had come up to the Lords upon this sort of demurrer),[3] that the party demurring must specify upon the record the facts which he admits.[4] That the rule was a new one is fairly plain from

Pike, 49 N. H., pp. 436–442, and Boardman *v.* Woodman, 47 N. H. pp. 146–150; and the opinion of the court (Ladd, J.) in State *v.* Jones, 50 N. H. 369.

[1] Tindal *v.* Brown, 1 T. R. pp. 168–9.

[2] Per Lord Loughborough, Doug. 724, note.

[3] Gibson *v.* Hunter, 2 H. Bl. 187; Lickbarrow *v.* Mason, ib. 211.

[4] This is the rule laid down by Eyre, C. B., in his advisory opinion to the Lords, and it is taken to have been the ground of the judgment.

the case of Cocksedge *v.* Fanshawe,[1] ten years earlier. It was not always followed in this country, but the fact that it was really a novelty was sometimes not understood.[2]

In handling this keen-edged instrument, the demurrer to evidence, it is more than likely that the just line between the duties of court and jury was often overstepped by assuming that what the court thought the right inference was the only one allowable to the jury. Nothing is more common, even to-day, than the assumption that nothing but a question of law remains, when, in reality, the most important and even necessary inferences of fact are still to be drawn. In this way much which belongs to the jury passes over, unnoticed, into the hands of the judges.

3. A powerful resource of the judges lay in their right to shape and to change the forms of pleading. A party was permitted and encouraged to spread his case upon the record with a view to avoid the jury. This gave all into the hands of the judges upon a demurrer, and even without a demurrer enabled them, for various purposes, to assume all the facts to be known. The way in which libel cases were thus influenced is clearly pointed out by Chief-Justice Shaw:[3] "The theory of those judges who held that the jury were only to find the fact of publication and the truth of the averments, colloquia, and innuendoes, was this: that when the words of the alleged libel are exactly copied, and all the circumstances and incidents which can affect their meaning are stated on the record, inasmuch as the construction and interpretation of language, when thus explained, is for the court, the question of the legal character of such libel . . . would be placed on the record, and therefore, as a question of law, would be open after verdict on a motion in arrest of judgment." The fierce struggle that went on over this question, ending in the statute that recognized the jury's right to give a general verdict, in cases of criminal libel, as in others,[4] is a standing testimony to the practical importance of the question who should apply the law to the fact. The history of

[1] 1 Doug. 119 (1779–1783).

[2] Patrick *v.* Hallett, 1 Johns. 241 (1806); Whittington *v.* Christian, 2 Randolph, pp. 357–8 (1824); Trout *v.* R. R. Co., 23 Gratt. pp. 619–20, 635–40 (1873). Demurrers to evidence are mainly obsolete in this country. What is called by this name now is often a very different thing.

[3] Com. *v.* Anthes, 5 Gray, p. 214.

[4] St. 32 Geo. III. c. 60. Cap. & Counties Bank *v.* Henty, 7 App. Cas. 741; s. c. 31 W. R. 157.

the jury is full of illustrations of the importance of this function. To leave to the jury, on the one hand, what is called a mixed question of law and fact, with the proper alternative instructions as to what the law is upon one or another supposition of fact, and, on the other hand, to have such a question remain with the court after the jury have reported upon the specific questions of fact, are two exceedingly different things. Within permissible limits there is generally some range of choice in matters of intendment and inference; it makes a great difference who has the right to the choice. Moreover, since mistakes are possible, and even wilful error, he who wishes either of these two tribunals to judge may well prefer to have the mistake made by one rather than the other.

The modern action for malicious prosecution, represented formerly by the action for conspiracy, has brought down to our own time a doctrine which is probably traceable to the practice of spreading the case fully upon the record, namely, that what is a reasonable and probable cause for a prosecution is a question for the court.[1] That it is a question of fact is confessed,[2] and also that other like questions in similar cases are given to the jury. Reasons of policy led the old judges to permit the defendant to state his case fully upon the record, so as to secure to the court a greater control over the jury in handling the facts, and to keep what were accounted questions of law, *i.e.*, questions which it was thought should be decided by the judges, out of the jury's hands. Gawdy, J., in such a case, in 1601–2, "doubted whether it were a plea, because it amounts to a *non culpabilis*. . . . But the other justices held that it was a good plea, *per doubt del lay gents*."[3] Now that the mode of pleading has changed, the old rule still holds; being maintained, perhaps, chiefly by the old reasons of policy. Mr. Herbert Stephen's interesting little book on "Malicious Prosecution" (Preface, and pp. 70–83) has an ingenious suggestion, viz., that the judgment in Abrath *v.* N. E. R'y Co.,[4] supporting, as it is thought to do, a practice of asking the jury certain specific questions, and instructing them to find reasonable and probable cause or not, according to their answers,— amounts in effect to

[1] Panton *v.* Williams, 2 Q. B. 169; Stewart *v.* Sonneborn, 98 U. S. 187.

[2] Lister *v.* Perryman, L. R. 4 H. L. 521.

[3] Pain *v.* Rochester, Cro. Eliz. 871; Chambers *v.* Taylor, ib. 900.

[4] 11 App. Cases, 247.

suggesting a definition of this phrase, and turning the question into "a question of fact" (meaning, of course, a question of fact *for the jury*), whether those things were true which the definition called for.[1]

The most singular product of this way of withdrawing questions from the jury was the doctrine of "color" in pleading. In St. Germain's quaint dialogue of the "Doctor and Student,"[2] there is an amusing, grave discussion as to the morality of the fiction of color, and incidentally an explanation of it by the Student. The discussion ends by the suggestion of the Student that it is a man's duty, out of love to his neighbor, to save the jury from the peril of a wrong finding, by avoiding the general issue wherever he can, — an argument which the Doctor agrees to ponder. In setting forth this matter, the Student states the rule that one must not plead detail which amounts only to the general issue; and yet in some cases, if he do plead the general issue, he will have to leave a point of law "to the mouths of twelve laymen, which be not learned in the law; and, therefore, better it is that the law be so ordered that it be put in the determination of the judges than of laymen." Accordingly, the party was permitted to turn his traverse into a confession and avoidance, by alleging and admitting some fictitious ground of right, not quite defensible in point of law, and then avoiding it by his detailed matter, which regularly would be only an argumentative general issue. This got his matter on the record, and at the same time the sacred rule that one must either traverse or confess and avoid moulted no feather. Form was preserved, the party had confessed and avoided; to be sure he had set up a mere fiction; but the other party was not allowed to deny it, and he *had* kept to the rules.[3]

4. Another way of securing for the court the application of the law to the facts was that of urging and even compelling special verdicts. It was the old law that a jury, if it chose to run the risk of a mistake, and so of the punishment by attaint, might always find a general verdict.[4] But the judges exerted pressure to secure special verdicts; sometimes they ordered them, and enforced their instruction by threats, by punishing the jury, and by giving a

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[1] Compare Humphries *v.* Parker, 52 Me. 502.
[2] c. 53.
[3] Stephen, Pleading, Tyler's ed., 206–215.
[4] Co. Lit. 228 *a*.

new trial.[1] As matter of history, we know that the jury successfully stood out against this attempt, and that their right was acknowledged.[2] It is interesting to notice how far judges and legislatures in this country have travelled back towards the old result of controlling the jury, by requiring special verdicts and answers to specific questions.[3]

5. In the mere process of guiding and supervising the jury, the judges have not only modified the manner of the jury's action in dealing with questions of fact, but have removed many such questions from their control. This has been done very extensively by laying down rules of presumption. These are sometimes not so much rules, as mere formulæ, indicating what judges recognize as permissible or desirable in the jury; but often they are strictly rules for the decision of questions of fact. If it be said that when such a rule exists the question of fact merely ceases, wholly or in part, and turns into a question of law, or, at any rate, of the application of law, over which the judges have more control, this is true; but the act of creating such a rule, inasmuch as it permanently withholds certain questions from the jury, involves a decision by the judges, not merely of the single question of fact in the case in hand, but, thereafter, of the whole class of such questions.[4] In the long history of trial by jury this process has always gone on, sometimes as a mere inevitable step in the work of a tribunal which regards precedent and seeks for consistency in administration, sometimes as a sharp and short way of bridling the jury. Such things were done as being mere administration, as rightly belonging to the judges, who had, what the juries had not, the responsibility of supervising the conduct of judicature and of securing the observance, not merely of the rule of law, but of the rule of right reason. But we are none the less interested to notice that the actual working of this process has transferred a great bulk of matter of fact from the jury to the court by

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[1] Chichester's Case, Aleyn, 12 (1644); Gay *v.* Cross, 7 Mod. 37 (1702); R. *v.* Bewdley, 1 Peere Williams, 207 (1712).

[2] Mayor of Devizes *v.* Clarke, 3 A. & E. 506.

[3] See Mr. W. W. Thornton's article in 20 Am. Law Rev. 366, on "Special Interrogatories to Juries." In Atch. R. R. Co. *v.* Morgan, 22 Pac. Rep. 995 (Jan. 1890, Kansas), seventy-eight questions were put to the jury, filling nearly three octavo pages, of fine print and double columns.

[4] For a discussion of this general topic I beg to refer to an article on "Presumptions and the Law of Evidence," 3 Harv. Law Rev. 141.

the simple stroke of declaring that it shall no longer be dealt with merely as matter of fact, but shall be the subject of rules, — rules of practice, rules of good sense, prima facie rules of law, even conclusive rules of law; as when, in regard to the facts involved in cases of prescriptive rights, it was perceived how hard it often is to prove them, *propter brevem hominum vitam*, and the judges established the rule that when once you had given evidence running back through the term of living memory, the rest of the long period of legal memory might be covered by a presumption. It was admitted to be a question of fact and for the jury, whether it was so or not; but the judges were not content to leave it there, for they perceived the very slender weight of the evidence. "No doubt," said Blackburn,[1] "usage for the last fifty or sixty years would be some evidence of usage seven hundred years ago; but if the question is to be considered as an ordinary question of fact, I certainly, for one, would very seldom find a verdict in support of the right as in fact so ancient." And so, in such cases, the judges instructed the jury that they "ought" to find what was thus presumed; and, what was more, they enforced the duty upon nisi prius judges and upon juries by granting new trials if it was disregarded.[2]

6. It will be perceived that, in theory, the judges have almost always paid homage to the jury's separate and independent right. Seldom have they failed to do that. Yet the judges supervise and moderate their action, and herein lies one of the most searching and far-reaching grounds of judicial control, — that of keeping the jury within the bounds of reason. This function, as well as that of preserving discipline and order, belongs to the judge as the presiding officer over the exercise of the judicial function. All subordinate officials must keep within the limits of reason, even in the exercise of their own special office; and it is the judges who are to apply this rule. Reason is not so much a part of the law, as it is the element which it breathes; those who have to administer the law can neither see nor move without it. Therefore, not merely must the jury's verdict be conformable to the rules of law, but it must be defensible in point of sense and reason; it must not be absurd or whimsical. This is obviously a different thing from imposing upon the jury the judge's private standard of what is

[1] Bryant *v.* Foot, L. R. 2 Q. B. p. 172.

[2] Jenkins *v.* Harvey, 1 Cr. M. & R. 877.

reasonable; as, for example, when the question for the jury itself is one of reasonable conduct. In such a case, the judges do not undertake to set aside the verdict because their own opinion of what is reasonable in the conduct on trial differs from the jury's.[1] The question for the court, it will be observed, is not whether the conduct ultimately in question, *e.g.*, that of a party injured in a railway accident, was reasonable, but whether the jury's conduct is reasonable in holding it to be so; and the test is whether a reasonable person could, upon the evidence, entertain the jury's opinion. Can the conduct which the jury are judging, reasonably be thought reasonable? Is that a permissible view?

We might anticipate, as was said before in speaking of the demurrer upon evidence, that this line would often be overstepped. It often has been. It is the line which was under discussion in an important modern suit for libel,[2] when, in considering the power of the court in such a case, on a motion in arrest of judgment, Lord Penzance insisted that a court could not take it from the jury, if the publication was reasonably capable of a libellous construction. But it was laid down by Lord Blackburn that the court was to judge for itself; and he added, "It seems to me that when the court come to decide whether a particular set of words, published under particular circumstances, are or are not libellous, they have to decide a very different question from that which they have to decide when determining whether another tribunal, whether a jury or another set of judges, might not unreasonably hold such words to be libellous."[3] That this discrimination was, probably, not fully attended to in a great many of the cases where, in one way or another, facts have been referred to the court I have already said. The point may be further illustrated by two cases on the subject of necessaries for an infant. Formerly in such cases the plaintiff, in reply to the plea of infancy, put upon the record the facts which were thought to show that what had been furnished were necessaries; this gave the opportunity for a demurrer. Nowadays these facts are not pleaded, and the question goes to the jury. Under the former practice the parties got simply the court's opinion; now they get the jury's, which may be a very different matter. The jury's

[1] Stackus *v.* R. R. Co., 79 N. Y. 464.

[2] Capital and Counties Bank *v.* Henty, 7 App. Cas. 741, s. c. 31 W. R. 157.

[3] This distinction is of fundamental importance in constitutional law. Harv. Law Rev. i. 92, note; Powell *v.* Pa., 127 U. S. 678.

verdict is, indeed, subject to the court's revision; but at this stage, as we see, the court asks merely that "very different question," which Lord Blackburn mentions, whether the jury could reasonably find them to be necessaries. In Makarell *v.* Bachelor,[1] in 1597, the plaintiff sued in debt for apparel, and upon a plea of infancy, replied that the defendant "was one of the gentlemen of the chamber to the Earl of Essex, and so it was for his necessary apparel; and it was thereupon demurred. The court held that they were to adjudge what was necessary apparel; and such suits . . . cannot be necessary for an infant, although he is a gentleman." But in Ryder *v.* Wombwell,[2] in 1868, where a like question went to the jury, and was found for the plaintiff, the court, in granting a nonsuit on the ground that there was no evidence sufficient to warrant the verdict, laid down the general principle (1) that the court may always say, whether *prima facie*, having regard to "the usual and normal state of things," which is known to judges as well as to juries, certain things "may be" necessaries; and (2) that if evidence is offered of special circumstances, changing the usual state of things, the question for the court is whether, upon the evidence, the jury could reasonably find them necessaries.

It seems, then, to be thoroughly plain that the attributing to the jury of questions of fact, in our common-law system, is to be taken with the gravest qualifications. Much fact which is part of the issue is for the judge; much which is for the jury is likely to be absorbed by the judge, "whenever a rule about it can be laid down."[3] As regards all of it, the jury's action may be excluded or encroached upon by the coöperation of the judge with one or both of the parties; and, as regards all, the jury is subject to the supervision of the judges in order to keep it within the limits of reason.

Before passing from questions of fact, it will be well to turn for a moment to what are called "mixed questions of law and fact," such as negligence, ownership, or insanity. What shall be said of these?[4] It seems that there is no occasion to speak of them as

[1] Cro. El. 583. [2] L. R. 4 Ex. 32.

[3] Tindal *v.* Brown, 1 T. R. 167, per Lord Mansfield; Holmes' Com. Law, 122-9.

[4] Austin (Jurisp. i. 236, ed. 1873) says, "They are questions neither of law nor of fact.

anything other than mere matters of fact. The circumstance that in order to deal with them it is necessary to know what the legal definition is, does not really affect the matter.[1] It is sometimes necessary that the jury should be advised as to the ordinary definitions of the dictionaries; but this is needed only to give precision to their inquiry, and does not alter the nature of it. So of any legal definition. The meaning of "burning," in the law relating to arson, is a highly technical one; and so of "breaking and entering," in burglary; because a definition must be given, is it any the less a simple question of fact whether an accused person has burned or broken and entered a given house? And so of such questions as title to property, or insanity. Equally, where the courts or statutes have fixed the legal standard of reasonable conduct, *e.g.*, as being that of the prudent man, the determination of whether any given behavior conforms to it or not is a mere question of fact.[2] That in reaching their conclusion the jury must reason, and must "judge the facts," is not material, as we have already seen; always they must do that; the difference in this respect between these cases of reasonableness and others is simply one of more or less.[3] It is, indeed, to be recognized, as we have seen, that such questions become, from time to time, the subject of more specific legal rule or definition, as in the case of notice of the dishonor of a bill of exchange. But where that has taken place, all that has happened is a change in the legal rules; the rule of "reasonableness" is either displaced or narrowed. When once the exacter rule is known, what is left is none the less a mere question of fact.

V. As to the other aspect of the maxim, that which excludes the jury from the law, the rule seems to be in a far simpler condition. From the beginning, indeed, it was perceived that any general verdict, such as no disseisin, or not guilty, involved a conclusion of law, and that the jury did, in a sense, in such cases

[1] See, for example, People *v.* Hawkins, 109 N. Y. p. 411.

[2] Eaton *v.* Southby, Willes, 131; Haskins *v.* Ham. Co., 5 Gray, 432.

[3] Vaughan, C. J., in Bushell's Case (Vaughan, p. 142), in speaking of the ordinary sort of question, says: "The Verdict of a Jury and Evidence of a witness are very different things in the truth and falsehood of them. A Witness swears but to what . . . hath fallen under his senses. But a Juryman swears to what he can inferr and conclude from the Testimony of such Witnesses by the act and force of his Understanding to be the Fact inquired after, which differs nothing in the Reason, though much in the Punishment, from what a Judge, out of various Cases considered by him, inferrs to be the Law in the Question before him."

answer a question of law. That was the very ground of some of the arrangements already mentioned for removing the final question from them. Moreover, in many criminal cases their verdict could not be controlled. "It was never yet known," said Pratt, C. J.,[1] "that a verdict was set aside by which the defendant was acquitted in any case whatsoever, upon a criminal prosecution." In such cases the judge could not govern their action; he could simply lay down to them the rule of law; and this it was their duty to take from him and apply it to the fact. Now, although this might be their duty, yet since, in some cases, there was in the judge no power of control or revision, it was evident that the jury had the final power to find the law against the judge's instruction. This power, where it was uncontrollable, has been considered by some to be not distinguishable from a right; and it is not at all uncommon to describe it thus, as a right to judge of both law and fact. In the first trial by jury at the bar of the Supreme Court of the United States, in 1794, Chief-Justice Jay, after remarking to the jury that fact was for the jury and law for the court, went on to say: "You have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."[2] But I am disposed to think that the common-law power of the jury in criminal cases does not indicate any right on their part; it is rather one of those manifold illogical and yet rational results, which the good sense of the English people brought about, in all parts of their public affairs, by way of easing up the rigor of a strict application of rules.

It seems, then, that whatever power over questions of law has fallen into the hands of juries, in the actual working of our legal machinery, yet it is the duty of the judges to give them the rule, and their duty, in point of theory, to follow the rule thus ascertained. We may probably still quote with approval Hargrave's note[3] as being an accurate statement of the common law.

One or two peculiar situations should be here referred to.

(1.) In determining what is the law of the domestic forum, the

[1] King *v.* Jones, 8 Mod. 201, at p. 208 (1724).

[2] Georgia *v.* Brailsford, 3 Dallas, 1. See the remarkable collection of authorities in support of this view in a note to Erving *v.* Cradock, Quincy's Reports, 553, 558–572, understood to have been prepared by Horace (Mr. Justice) Gray. Compare 1 Bishop, Crim. Proc., 3d ed., sects. 977, 983–988; 2 Thomp. Trials, sect. 2133; Pierce's Life of Sumner, i. 330.

[3] Co. Lit. 155 *b*, note 5.

courts settle all questions relating to the *factum* of the law, *e.g.*, whether, in enacting a statute, a specific requirement of the constitution as to the forms of enactment has been complied with. But, as regards foreign laws, it is held that the question of their existence is wholly for the jury. This is said, on the theory that such laws are mere matters of fact; and so of the questions incidental to the ascertainment of them. Now, two things seem to be true: (*a*) that in an exact sense, as we have seen, these questions are questions of fact, and that equally the same questions about domestic laws are questions of fact; (*b*) that if the *factum* of domestic law is for the court, equally the factum of foreign law should be, — assuming it to be true that it is wanted, in order to determine the rule or law of the case. Such law, as well as the domestic law, should be determined by the judge. The circumstance that while the domestic law does not need to be proved by "evidence," strictly so called, foreign law must be so proved, is not material. In reason the judges might well enough be allowed to inform themselves about foreign law in any manner they choose,[1] just as the judges of the Federal courts notice without proof the laws of all the States. But since it is required to be proved, it should be proved to the judge.[2] The doctrine, however, that it is for the jury has a wide acceptance; and, so far as it goes, if this is not a deduction from the general principle that the jury are not to answer to law, it is at least a departure from the mode of applying that principle in the case of domestic law; for as we have seen, a question of fact relating to law which in the latter case is attracted to the tribunal that deals with law, in the other case is not. Consistency and principle would give the last case also to the judges.

(2.) Another situation may be mentioned. The relation of the judge to the jury is necessarily one of mutual assistance. As the judges give the jury advice, information, and aid touching the jury's special province, so they call upon the jury for assistance in determining their own questions. The method of the chancery judges, of referring a question for trial to a common-law jury, in order to inform and aid them, giving, however, to a jury's verdict such weight as the judge thinks best, may indicate the nature of this thing. Questions of facts, in equity, are for the judge, but he

[1] It was judicially noticed in State *v.* Rood, 12 Vt. 396.

[2] Pickard *v.* Bailey, 26 N. H. 152; Lockwood *v.* Crawford, 18 Conn. 361 (by statute); Story, Confl. Laws, s. 638; 1 Grlf. Ev. s. 486.

profits sometimes by the advice of a common-law jury. So courts of common law, in construing a writing, sometimes ask the jury for the mercantile meaning or understanding of it, — not because they intend to leave the decision of the question to them, but in order to profit by their opinion; just as Lord Mansfield and others built up the commercial law by taking the opinion of special juries and their reports as to mercantile usage, and founding rules of presumption upon them when they appeared to be reasonable. To aid them in the construction of writings, judges may well have the evidence of mercantile experts.[1] And, on the same principle, they may take the opinion of a special jury; and may submit to any jury any proper question, that is to say, any question depending upon a judgment of matters which the jury may fairly be supposed to know more about than the court. In such cases, instead of first receiving the opinion of the jury and then deciding the point, a judge may leave the question to them with contingent instructions, *e.g.*, that if they find that the usage, custom, understanding, or practice of merchants is so and so, then they shall find so and so as to the interpretation of a certain contract or a certain transaction. A good illustration of this is found in Hawes *v.* Forster.[2]

In the great case of Lickbarrow *v.* Mason, where were brought in question the respective rights of an unpaid seller of goods, and of one who, in good faith, without notice and for value, had bought from the first buyer, taking an indorsement of the bill of lading, — after the case had gone to the House of Lords on a demurrer upon the evidence, and had been sent back to a new trial for informality in the demurrer, the jury, at the new trial, in accordance with the judge's request, found a special verdict, stating the facts and adding the understanding and custom of merchants as to the rights of the parties under such circumstances. Thereupon the court, "understanding that the case was to be carried up," gave judgment, without reasons, for the plaintiff, who represented the sub-vendee. The case was settled, and was never carried up. Now, as regards the law upon this important point, two-thirds of the twelve judges who had been concerned in the case had been against the final opinion of the King's Bench, the one which accorded with the famous advisory opinion of Mr. Justice Buller to the Lords. Yet the law has always been considered as

[1] As in Pickering *v.* Barkley, Style, 132.

[2] 1 Moo. & Rob. 368; s. c. Lang. Sales, 410.

settled in accordance with the final judgment in the King's Bench and with the opinion of merchants as recorded in the special verdict there. "It is probable," says Blackburn, "that the finding of the jury of the custom of merchants had great weight."[1] The true significance of such a thing as this, the inserting in the verdict of the understanding and custom of merchants on a question of doubtful interpretation as to the meaning and legal result of certain commercial transactions, can only amount to a mode of assisting the court by the judgment of experts. The court need not follow it; it is not a determination which has any binding force; but it does present to the court a fact which may properly weigh with them in reaching a conclusion, just as the judgment of an expert witness presents to a jury a fact which may properly weigh with them in reaching their own independent conclusion upon the same point. The value of a knowledge of "the custom among merchants" in interpreting mercantile contracts and transactions had been emphatically recognized by Lord Harwicke a generation earlier.[2] A straightforward look at this sort of thing is taken by Lord Esher, in a late English case involving the construction of a policy of insurance.[3] "Anything," he says, "more informal, inartistic or ungrammatical than those policies or charter parties cannot be found, and until recently whenever a point arose as to their meaning our judges almost invariably took the opinion of the jury upon the question. They did not merely take the evidence of custom, they asked juries what their view of the contract was, and I myself should have been prepared to take the opinion of a jury on this point as a matter of business. It is said that there is this difficulty, that it would be necessary to take the evidence of average adjusters, and that these adjusters have proclaimed that they do not act upon any customs of merchants, but that they endeavor to follow the law. But I should have suggested

[1] Sale, 288. And so Christian, Bankruptcy, ii. 406: "As the decision of the Court of King's Bench, . . . though no reason was given, seems to be considered the present law, I presume it arises from the finding of the jury that the property in the goods is transferred by the blank indorsement and transmission of the bill of lading." As an original question, both Blackburn and Christian agree with the opinion of Lord Loughborough, as against Mr. Justice Buller and the King's Bench.

[2] Ekins *v.* Macklish, Ambler, 184 (1753); Kruger *v.* Wilcox, ib. 252 (1755). And so in the common-law courts, Fearon *v.* Bowers, 1 H. Bl. 364, *note*; and a hundred years before that, Pickering *v.* Barkley, Style, 132.

[3] Stewart *v.* Merchants' Mar. Ins. Co., 16 Q. B. D. 619, 627; s. c. 34 W. R. 208, 210.

that merchants should also be called as witnesses, and that the jury should decide after having heard the whole evidence.

The simple truth in such cases appears to be, that the court, whether or not they be quite ready as yet to adopt the opinion which they ask, as giving the legal rule, are wishing to know that opinion, as an aid to them, in laying down the law. They are not cases of submitting questions of law to the jury.

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